SUPREME COURT OF THE UNITED STATES.

THE ERIE RAILROAD COMPANY,
PLAINTIFF IN ERROR

AGAINST

ALBERT L. PURDY.

BRIEF FOR THE APPELLEE.

CLARENCE A. FARNUM,
Counsel for Appellee,
Wellsville, N. Y.

STATEMENT.

This is a writ of error to the Court of Appeals, the Supreme Court of the State of New York, bringing here for review the decision of the Court of Appeals affirming the order and judgment of the Appellate Division of the Supreme Court, Fourth Department, which denied the motion for a new trial made by the Erie Railroad Company, defendant below, plaintiff in error here, and ordered judgment against it in favor of Albert L. Purdy, the defendant in error, on the verdict directed at the Trial Term.

The case is reported below in 162 N. Y. 42-52; 48 L. R. A. 669. Twenty-one actions were brought by said Purdy against the said Railroad Company to recover penalties under the mileage book act or statute of the State of New York. The actions were consolidated by orders found at pages 61-64 of the Record herein. A verdict was directed by the Trial Court in favor of the plaintiff Purdy (the defendant in error here) and againts the defendant railroad company (the plaintiff in error here) for the penalties in each of the first ten causes of action and in favor of the defendant railroad company in the last eleven causes of action.

The railroad company only sought to review the action of the Trial Court.

The only Federal question raised by the defendant, railroad company upon the trial or at any time prior to the argument in the Court of Appeals was that the Act in question was an attempt on the part of the legislature of the State of New York to regulate commerce among the states and so in violation of the Constitution of the United States and void (Record page 103).

The defendant railroad company was organized and incorporated under the laws of the State of New York, November 14, 1895 under the general laws of the state for the incorporation of railroads (Record page 65) which incorporation occurred after the mileage book act of 1895 was in full force.

The mileage book act in force at the time the defendant railroad company was incorporated was passed June 15, 1895, and known as chapter 1027 of the general laws of that year, and was amended May 22, 1896 by chapter 835 of the laws of the State of New York.

These Acts are printed in full in the Brief of the counsel for the plaintiff in error, filed herein December 10, 1900 upon motion to dismiss this Writ of Error, and will be found at pages 34 and 35 of such Brief.

The counsel for the plaintiff in error not having filed any Brief upon the merits herein other than to which I have alluded, it is assumed he expects to rely upon that as his exposition of the case upon its consideration now by this Court upon the merits.

POINTS AND ARGUMENT.

I.

The plaintiff in error can urge in this Court no Federal question other than the one taken by him upon the trial of the issues in the case, namely, that the mileage book Act of the State is in violation of the United States Constitution in its attempt to regulate commerce among the states.

The defendant's case was tried upon the theory that the Act was an attempt upon the part of the state to regulate commerce among the states, and it must now be confined to the Federal question raised below in the trial court. Numerous questions other than those of a Federal nature were raised by it, but of course, none of them can be considered here. The Federal question was raised by the defendant company when the plaintiff had rested its case, by its motion for a nonsuit, which motion is set out in full at pages 102 and 103 of this Record. The Court of Appeals recognized this statement of the situation to be correct for in the opinion of the Court by Judge Cullen, writing for the Court, he says (Page 119 this Record) "No particular ground for the attack on the complaint is stated. At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole

ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. *The objection that the statute was an invasion of the defendant's property rights and contravened for that reason either the Constitution of the United States or the constitution of this State does not anywhere appear in the Record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below.*"

The allegations in the answers of the defendant corporation that the statute in question "is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the Constitution of the State of New York" is too indefinite under the common law system or any Code system of pleading to tender an issue, and it has been so held by the court of last resort of the state of New York, and such ruling being upon local law must be conclusive upon this Court (See Purdy v. Erie R. R. Co. 162 N. Y. pages 50–51). So, having raised one Federal question only in the court below by its pleading and by its conduct of the trial, it is confined in the appellate court to the points made upon the trial (Id.: Dodge v. Cornelius, 168 N. Y. 242, 245.)

See also, Maxwell V. Newbold 59 U. S., (18 How.) 511. (15 L. Ed. 506.) Messenger v. Mason, 77 U. S., (10 Wall.) 507, (19 L. Ed. 1028.)

Capital City Dairy Co. v. Ohio, 22 Sup. Ct., 120, 124.

The Supreme Court will not consider questions not raised and passed upon in the court below, nor will the raising of one Federal question in the state court permit the consideration of other Federal questions than the one raised. (U. S. Revised Statutes § 709; *Wilson v. McNamee*, 102 U. S. 572; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626; 20 Sup. Ct. 205; *Dewey v. City of Des Moines* 173 U. S. 193; 19 Sup. Ct. 379; *Messenger v. Mason*, 10 Wall. 507 *Maxwell v. Newbold*, 18 How. 511.

If a party seek to raise a Federal question in this court by a writ of error to the state court he should distinctly point out to the court below wherein and whereby a Federal law has been violated. It must appear by the record that the point upon which he relies was made in the court below and decided against him, and that the provision of law in question was brought to the notice of the state court, and the right which

he now claims asserted before the trial court. (*F. G. Oxley Stave Co. v. Butler County* 166 U. S. 648; 17 Sup. Ct. 709; *Hoyt v. Thompson*, 1 Black 518; 17 Law. Ed. 65.)

In this case the opinion of Judge Cullen clearly shows no Federal question was raised by the pleadings nor considered other than the one of an attempt by the state to regulate commerce among the states.

II.

This Act of the Legislature of the State of New York does not attempt to regulate commerce between the states, and does not purport to nor could it act outside of the state.

The opening paragraph of the Act in question is, "Every railroad corporation operating a railroad *in this State* * * * shall issue mileage books."

The state had the power to regulate rates within its own confines.

(*Stone v. Farmers' Loan & Trust Co.* 116 U. S. 307; 6 Sup. Ct. 334; *Chicago & Grand Trunk Ry. Co. v. Wellman* 143 U. S. 339; 12 Sup. Ct. 400: *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; 17 Sup. Ct. 532; *Hopkins v. U. S.* 171 U. S. 578; 19 Sup. Ct. 40; *N. Y. N. H. & H. R. Co. v. New York* 164 U. S. 502; 17 Sup. Ct. 418.)

Every statute is presumed to be constitutional and every possible presumption is to be indulged in favor of the validity of the statute (*Mugler v. Kansas*, 123 U. S. 623; 8 Sup. Ct. 273; *Munn v. Illinois*, 94 U. S. 113.

Even if it could be thought the Mileage Book Act intended to operate upon interstate commerce as well as upon intrastate transportation, it would be held invalid only as to the former and a proper exercise of the legislative power upon the latter for the objectional part is clearly separable, and the residue of the act pertaining to intrastate transportation may be enforced without reference to the invalid portion. (*Reagan v. Farmer's Loan & Trust Co.* 154 U. S. 362: 14 Sup. Ct. 1047.)

But the Court of Appeals of the State of New York, the court of last resort in that state, having held that this Act applies only to points of transportation within the State of New York, such determination is conclusive upon this Court, the determination being one of local law. (*Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388: 21 Sup. Ct. 101.)

III.

The statute objected to being in force at the time the defendant railroad company became incorporated in November 1895, it does not lie within the power of the company to assert its invalidity.

The acts of the legislature of the state of New York, requiring railroad corporations thereafter incorporated to issue mileage books to persons applying therefor contain nothing wicked *per se;* it is not against public policy; it takes away no right ever granted a corporation; it does not violate the obligation of any contract, nor deprive the corporation organized under its laws after the passage of the acts, of its property without due process of law, nor is it an undue interference with the management of its property. (See opinion of the Court in this case in the Court of Appeals, 162 N. Y. 42–52: this Record, pages 116–120.)

The legislature of the state had power to refuse the incorporation of the defendant company; it had the power to construct railroads itself had it seen fit, and had power to impose fares, tolls and rates for transportation. If it granted the defendant company the privilege, not the right, of having corporate life it had the power of imposing reasonable conditions as a consideration for giving it existence, and can it be said that it is an unreasonable requirement that railroads thereafter incorporated shall issue to its people asking it, a mileage book entitling the holder thereof to travel one thousand miles upon its railroad within the state upon the payment to the corporation of twenty dollars? I deem the question so free from doubt that only one answer can be suggested. (*See Baltimore & Ohio R. Co. v. Maryland*, 21 Wall. 473; 22 Law. Ed. 678; *Pinney v. Nelson*, Decided by this Court December 2, 1901, reported in 22 Sup. Ct. 52–55: *Hale v. Lewis*, 181 U. S. 473; 21 Sup. Ct. 677; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73; 21 Sup. Ct. 535 *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; 20 Sup. Ct. 518.) *Cooley's Cons't. Lim.* (6th ed.) 479–480: *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677; 16 Sup. Ct. 714; *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. 865: *Louisville & N. R. Co. 2. Kentucky* 22 Sup. Ct. 95. 99; *Capital City Dairy Co. v. Ohio* 22 Sup. Ct. 120, 123.)

IV.

The case of LAKE SHORE & M. S. Ry. Co. v. SMITH, 173 U. S. 684; 19 Sup. Ct. 565 relied upon by counsel for the plaintiff, in error as governing this is not applicable.

The Court of Appeals of the State of New York in its discussion of this case (162 N. Y. 42–52) clearly distinguishes the cases, and in the case of *Beardsley v. N. Y. L. E. & W. R. R.* Co. 162 N. Y. 230, argued with this case, recognized the force of the *Smith Case*, and held the *Beardsley* case governed by it. The chief distinguishing features are that in the *Beardslee* case the defendant corporation was organized prior to the passage of the Mileage Book Acts, and the defendant company in that case had in the lower Court raised the question which was passed upon adversely to the corporation, that the act deprived the company of its property without due process of law (162 N. Y. 234) and so was permitted to raise the question and have it passed upon by the appellate court. Here, with the case in hand, the Mileage Book Act was in full force when the defendant corporation applied for and was granted its corporate existence, and must take its character subject to the laws of the state of New York, and bound as firmly by them as if the law itself had been expressly recited in its certificate of incorporation. (*Cooley's Cons't. Lim.* 6th Ed. 479; *Mayor v. Broadway & 7th Ave. R. R.* Co. 17 Hun 242, 244, 245; *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. 865).

The defendant company has not been deprived of any property or property rights by any statutory enactment made since its incorporation. The Act of 1895 imposed the obligation or burthen of issuing Mileage Books, which was placed upon it as a condition for its incorporation, and making the act in fact a part of its charter, and the Act of 1896 was a mere regulation regarding the form of the books, their sale and use, and contains nothing to the detriment of the defendant company. The provision of the Federal Constitution that no state shall deprive any person of property without due process of law, must, like that provision enjoining the impairing of the obligation of contracts, refer only to laws enacted after the making of the contract or obligation claimed to be impaired. (*Lehigh Water Co. v. Borough of Easton*, 121 U. S. 388; 7 Sup. Ct. 916; *Turner v. Board of Com. Wilkes* Co. 173 U. S. 461; 19 Sup. Ct. 464; *Pinney v. Nelson*, 22 Sup. Ct. 52, 54.)

The law of 1895 after its amendment in the year 1896, stood

as first enacted, except as modified by the amendment. (*Matter of Warde*, 154 N. Y. 342; *Matter of Prime*, 136 N. Y. 347; Laws of New York 1892 Chapter 677, § 32: as amended by laws 1894 Ch. 448 *Matter of Davies*, 168 N. Y. 89, 100.)

V.

The Court of Appeals of the State of New York, the highest court of the state, having affirmed this judgment of Purdy against the defendant railroad company (162 N. Y. 42) upon either of two grounds, namely, (1) that the Act in question applied to railroad transportation wholly within the state, and was not a regulation of commerce among the states, and also. (2) that the objection that the Act invaded the property rights of a corporation in violation of the State or Federal Constitutions, was not available in the Court of Appeals because not taken below, this Court is without jurisdiction to hear the case upon the merits, and should dismiss, for the judgment may well be supported upon the ground not involving a Federal question.

Rutland R. Co. v. Cent. Vt. R. Co. 159 U. S. 630: 16 Sup. Ct. 113; *Pierce v. Somerset Ry.* 171 U. S. 641; 19 Sup. Ct. 64; *Seeberger v. McCormick*, 175 U. S. 274; 20 Sup. Ct. 128.)

VI.

A summary of the position of the appellee, briefly stated is (1) that the plaintiff in error in this court is confined to one question only, namely, that the Mileage Book Act is in violation of the United States Constitution in its attempt to regulate commerce among the states, for that was the only Federal question raised in the court below; (2) that the highest court of the state having determined that the statute applied only to transportion within the state of New York, is conclusive upon this Court; (3) that the statute of which it complains having been in force at the time it received its corporate existence, and not being objectionable *per se.* the corporation takes subject to it and cannot urge that its property is taken by the act without due process of law, and (4) that the Court of Appeals having before it another question other than a Federal question, its judgment may be supported without involving the Federal question.

It is respectfully submitted that this judgment should be affirmed or the writ of error dismissed.

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